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NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DANIEL J. McCARTHY, Petitioner

v.

ROULETTE BLAIR, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit has improperly and unduly expanded the scope of federal habeas corpus relief by granting federal collateral relief in the absence of any federal violation based solely on an alleged violation of a state procedural rule plus a finding that it is "reasonably probable" a different result would have occurred in the absence of the error of state law.

2. Whether a federal court can avoid the clear limitation on retroactive application of new federal rules, by choosing to recast the issue in terms of a "violation of state law plus prejudice," which can be claimed in almost any federal habeas corpus petition.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner

v.

ROULETTE BLAIR, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on March 27, 1989, in No. 87-6690, was ordered published and is reported at 881 F.2d 602. It was modified on February 27, 1990. On March 26, 1990, the Court of Appeals issued an order for publication denying the petition for rehearing and rejecting the

suggestion for rehearing en banc, with one judge voting to grant the petition for rehearing. The opinion, modification and order are included in the appendix to this petition.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is March 27, 1989, with a modification being ordered on February 27, 1990.

A petition for rehearing was denied on March 26, 1990. A suggestion for rehearing en banc was also rejected on March 26, 1990.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a

circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

CALIFORNIA PENAL CODE § 1170(c)

The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part

of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

STATEMENT OF THE CASE

On May 23, 1983, respondent entered a negotiated plea of guilty to a violation of California Health and Safety Code section 11351, charging possession of a controlled substance (codeine) for sale. At the time of the plea California law did not require that a defendant be advised, as part of the plea process, that a mandatory parole period would follow any term of imprisonment.[1/]

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1. It was not until the decision in In re Carabes, 144 Cal. App. 3d 927, 932 n. 4, 193 Cal. Rptr. 65, 68-69 n. 4 (1983), that California law required a defendant be advised of a parole period as a direct consequence of a guilty plea. Carabes was decided nearly three months after respondent pleaded guilty. Carabes expressly held that its

As a result of the negotiated plea, respondent was granted probation for three years. He was subsequently arrested for a probation violation and sentenced to state prison for three years. On March 3, 1986, he was released on parole. He was arrested as a parole violator on August 20, 1986.

While in custody on the parole violation, respondent filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that his due process rights under the Fourteenth Amendment were violated when he was not informed at the time of his plea that a mandatory parole period would follow his

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requirement of parole advice at the time of the plea was to be applicable only to guilty pleas taken after the date Carabes became final. Thus, at the time of respondent's plea in the case at bar, California did not require a defendant be advised at the time of his plea that a parole period would follow the term of imprisonment. California Penal Code section 1170(c) did not require such advice at the time of the plea since section 1170(c) is a sentencing statute and required only that at the time of sentencing the court had to inform the defendant of the parole period.

period of imprisonment.

The district court ordered the magistrate to hold an evidentiary hearing. The magistrate determined that respondent had not been advised of the parole period at the time of his plea, was unaware of the parole period at the time of his plea, and would not have pleaded guilty had he been advised of the parole period. The magistrate recommended the writ be granted, and the district court adopted the recommendation and ordered respondent released from parole. The district court relied on an opinion issued by the United States Court of Appeals for the Ninth Circuit on December 23, 1986, which was three and a half years after respondent pleaded guilty. The opinion, Carter v. McCarthy, 806 F.2d 1373, (9th Cir. 1986) cert. denied 484 U.S. 870 (1987), held for the first time (thus creating a new rule) that a parole period is a direct

consequence of a guilty plea and requires advice at the time of the plea. The district court applied Carter retroactively to grant the writ.[2/]

Petitioner filed a notice of appeal on November 24, 1987. The sole issue briefed on appeal was the retroactivity of the new rule announced in Carter v. McCarthy.

On March 27, 1989, the Ninth Circuit Court of Appeals issued an opinion for publication that found the state court had violated state law when it failed to advise respondent of the period of parole at the time of the plea. The Ninth Circuit further found that respondent was "prejudiced" by this error of state law since it was "reasonably probable" that a

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2. In Allen v. Bunnell, 891 F.2d 736 (9th Cir. 1989) the Ninth Circuit subsequently held that retroactive application of Carter is not warranted since Carter had declared a 'new rule' when it announced a mandatory parole term was a direct consequence of a guilty plea.

different result would have occurred in the absence of the error. This combination of "state law error plus prejudice" was deemed sufficient to justify federal habeas corpus relief.[3/] Since the court relied on this "state law error plus prejudice" test to decide the case, it declined to address the retroactivity of Carter. (See Appendix.)

On April 5, 1989, petitioner filed a petition for rehearing and suggestion for rehearing en banc. Petitioner argued that the opinion failed to consider the fact that prior to the Carabes decision California Law did not require parole advice at the time of the plea so no violation of state law occurred. Petitioner also argued that the opinion was

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3. In its opinion, the Ninth Circuit expressly recognized it was expanding the scope of federal habeas corpus relief, but noted it believed its 'prejudice standard' for state law violations sufficiently reserved habeas corpus to appropriate circumstances. (See Appendix.)

equivalent to applying the "new rule" of Carter retroactively since relief was granted based solely on a failure to advise of a parole consequence. Finally, petitioner argued that the effect of the opinion would turn the requirement of a federal violation upside down and allow federal habeas corpus to serve as a tool for review of all state law issues whenever an allegation of "prejudice" is made.

On February 27, 1990, the Ninth Circuit modified the opinion slightly but made no significant change. On March 26, 1990, the Ninth Circuit denied the petition for rehearing with one judge voting to grant rehearing. The suggestion for rehearing en banc was also rejected, with one judge believing it might be warranted.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the following special and important reasons:

1. The expansion of the scope of federal habeas corpus to reach any violation of state law that is coupled with "prejudice" conflicts with the clear language and intent of 28 U.S.C. § 2254(a) and the decision of this Court in Engle v. Isaac, 456 U.S. 107, 119-121 (1982), that habeas corpus relief cannot be obtained based on a mere error of state law.

2. This Court should decide an important question of federal law involved in this case, namely, whether a federal court can avoid the clear limitation on retroactive application of "new rules" by choosing to utilize the device of recasting the issue in terms of a "violation of state law plus prejudice" which can be alleged in almost any federal habeas corpus petition.

ARGUMENT

I

THE OPINION OF THE NINTH CIRCUIT IMPROPERLY EXPANDS THE SCOPE OF OF FEDERAL HABEAS CORPUS TO REACH ANY ALLEGED VIOLATION OF STATE LAW THAT IS COUPLED WITH AN ALLEGATION OF PREJUDICE AND THUS PERMITS FEDERAL COLLATERAL RELIEF IN THE ABSENCE OF ANY FEDERAL VIOLATION

In the instant case the Court of Appeals for the Ninth Circuit granted federal habeas corpus relief based purely on a violation of state law[4/] plus a finding of "prejudice." The court basically held that any violation of state procedural rules coupled with a showing that a different result was "reasonably probable" in the absence of the state law error, is sufficient to entitle a petitioner to

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4. Petitioner questions the legitimacy of the court's finding that a violation of state law occurred. At the time of respondent's guilty plea no state law required that a defendant be advised of parole consequences at the time of the plea. See Carabes, 144 Cal. App. 3d at 932 n. 4. This aspect of the case is discussed more fully in footnote 1 of this petition.

federal habeas corpus relief under 28 U.S.C. § 2254. This would turn the requirement of a federal violation upside down and allow federal habeas corpus to serve as a tool for review of all state law questions whenever an allegation of "prejudice" is made.

This error is the result of the Court of Appeals in the instant case relying on language from a case involving relief under 28 U.S.C § 2255 for a violation of a federal procedural rule in a federal conviction (United States v. Timmerick, 441 U.S. 780, 783-785 (1979)) rather than review of a violation of a state rule in a state conviction under 28 U.S.C. § 2254.

Similarly, the other cases relied upon by the Court of Appeals involved actual Sixth Amendment violations of the right to counsel that constituted due process violations of the Fourteenth Amendment (Hill v. Lockhart, 474 U.S. 52 (1985);

Strickland v. Washington, 466 U.S. 668 (1984)) rather than simply a violation of a state procedural rule. In both of the other cases cited by the Court of Appeal, no relief was granted for alleged violations of state law since no federal due process deprivation resulted. See Wayne v. Raines, 690 F.2d 685, (9th Cir. 1982) cert. denied., 464 U.S. 914 (1983); Wacht v. Cardwell, 604 F.2d 1245 (9th Cir. 1979).

Thus, for the first time, a Court of Appeals has granted relief for a violation of state law without finding a federal constitutional right was involved. This "expansion of the scope of habeas relief" is totally inconsistent with the proper limited scope of federal habeas corpus. See Engle v. Isaac, 456 U.S. 107 (1982).

This approach will allow a federal court to review any case, including capital cases, to determine if at any point a state

defendant was prejudiced by a violation of a state rule. If the court finds it "reasonably probable" that a different result would have occurred in the absence of the error of state law, it can grant relief although no federal constitutional issue is involved. This rule could be applied to any state law issue, including rules of notice, rules of evidence, or rules of pleading. The Ninth Circuit implicitly recognized it was expanding the scope of federal habeas corpus when it felt constrained to note in the opinion that "[w]hile we are cognizant of the need to avoid undue expansion of the scope of habeas relief, we are certain that . . . this prejudice standard sufficiently reserves habeas corpus relief to only those instances" where it is appropriate. In fact, it extends habeas relief into areas where it is most inappropriate. A technical violation of a state procedural

rule simply does not provide a sufficient basis for federal collateral relief.

II

A FEDERAL COURT SHOULD NOT BE ALLOWED TO AVOID LIMITATIONS ON RETROACTIVITY OF NEW RULES BY RECASTING THE ISSUE FROM FEDERAL DUE PROCESS TO A "VIOLATION OF STATE LAW PLUS PREJUDICE" ANALYSIS

In the instant case respondent claimed he was denied due process under Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986), due to the lack of advice concerning parole consequences at the time of his plea. However, Carter v. McCarthy declared a new rule and cannot be applied retroactively to grant collateral relief. See Teague v. Lane, 109 S. Ct.1060 (1989); Penry v. Lynaugh, 109 S. Ct. 2935 (1989). In fact, in Allen v. Bunnell, 891 F.2d 736 (9th Cir. 1989), the Ninth Circuit expressly held that retroactive application of Carter was not warranted since Carter had declared a "new rule" when it announced a mandatory

parole term was a direct consequence of a guilty plea. Id., at 737-738.

In order to avoid the limitation on retroactivity the Ninth Circuit unilaterally and without notice to any party (or opportunity for briefing or argument) recast the issue as one involving state law advice concerning pleas. The court then found a state law error plus "prejudice" justified federal habeas corpus relief even though no federal due process violation was found. Of course, the court could not find the failure to advise constituted a violation of federal due process because that is the holding of Carter and retroactive application of Carter is prohibited. Interestingly, the court was extremely careful not to use the term "due process" at any point in its discussion of the issue. Clearly, the court was basing federal collateral relief solely on state law.

This device allowed the Ninth Circuit to grant relief for failure to advise of a parole consequence when retroactive application of Carter was prohibited. The same prohibited result was reached, however, since relief was granted solely for failure to advise of a parole consequence and that is equivalent to applying Carter retroactively.

The same policy considerations that prohibit the retroactive application of new federal rules to state cases on collateral review should prevent a federal court from reaching the same result as a retroactive application by resorting to the transparent device of casting the issue as one of state law. This Court should grant certiorari to make clear that new due process rules cannot be applied retroactively by merely interpreting state rules that do not rise to the level of due process violations as a basis for federal relief.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

Dated: May 2, 1990

Respectfully submitted,

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROULETTE BLAIR,
Petitioner-Appellee,

v.

DANIEL J. MCCARTHY, et al.,
Respondents-Appellants.

No. 87-6690
D.C. No.
CV-87-2508-WJR
OPINION

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Submitted October 3, 1988*
San Francisco, California

Filed March 27, 1989

Before: Jerome Farris, Cecil F. Poole and
Warren J. Ferguson, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Criminal Procedure/Habeas Corpus

Affirming the grant of a writ of habeas corpus, the court held that a prisoner had established sufficient prejudice from a state court's violation of state criminal procedure.

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Appellee Roulette Blair pled guilty in state court to a drug charge. His conviction was subject to a mandatory parole term of which he was not informed when the plea was taken. He was later arrested and imprisoned for parole violation. He contended that the state court's error denied him due process.

[1] Once a habeas petitioner proves that the state court violated a state law by failing to inform him of a consequence of his plea, he should be granted collateral relief if he shows that there is a reasonable probability that he would not have pleaded guilty, but for the error. [2] Applying this principle to this case, the writ should be granted since it was undisputed that the petitioner was unaware of the mandatory parole term, and would not have pled guilty if he had been.

COUNSEL

William R. Weisman, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Paul E. Potter, Potter & Cohen, Pasadena, California, for the petitioner-appellee.

OPINION

FERGUSON, Circuit Judge:

Appellant McCarthy, Director of the Department of Corrections of the State of California, appeals the district court's decision to grant appellee Blair's petition for a writ of habeas corpus. We affirm.

In May 1983, Roulette Blair, pursuant to a plea bargain, entered a plea of guilty in state court to possession of a controlled substance (codeine) for sale, in violation of the Cal.

Health & Safety Code § 11351(a). The trial court suspended Blair's sentence and placed him on probation for three years. Blair's conviction was subject to Cal. Penal Code § 3000(a), which imposes mandatory parole for a period not to exceed three years.

In December, 1983, Blair was arrested for a probation violation and sentenced to three years in state prison. In March, 1986, Blair was released on parole. He was, however, arrested as a parole violator in August, 1986, and reincarcerated.

While in custody, after exhausting his state remedies, Blair filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming, among other things, that his due process rights under the Fourteenth Amendment of the Constitution had been violated as he was not informed of, and consequently was unaware of, § 3000(a)'s mandatory parole term at the time he entered his guilty plea in 1983. He claimed that had he known of the mandatory parole term, he would not have pleaded guilty. The district court ordered the federal magistrate to hold an evidentiary hearing. The magistrate determined that Blair was not informed of, nor otherwise aware of, the mandatory parole period when he pleaded guilty, and that he would not have pleaded guilty had he known of the parole period. Based upon this finding, the magistrate recommended that the writ be granted. The district court adopted the magistrate's findings, conclusions and recommendations, and ordered that Blair be released from any further service under his parole term. We granted a stay of the district court judgment pending final determination on this appeal, but ordered that Blair be released from state prison.

The decision whether to grant or deny a petition for habeas corpus is reviewed de novo. *Weygandt v. Ducharme,* 774 F.2d 1491, 1492 (9th Cir. 1985).

McCarthy concedes that the state trial court violated state law by failing to inform Blair that he was subject to a manda-

tory parole term. *See* Cal. Penal Code § 1170(c).[1] McCarthy also does not dispute the district court's finding that Blair was unaware of the mandatory parole term and that, had he known of such a term, he would not have pleaded guilty. Thus, we need only decide whether the harm Blair suffered as a result of the state trial court's violation of state law constitutes a sufficient basis to grant collateral relief under § 2254.[2]

This court has expressly recognized that a criminal defendant can obtain federal collateral relief for a violation of a state rule of criminal procedure. *See Wayne v. Raines,* 690 F.2d 685, 687 (1982), *cert. denied,* 464 U.S. 914 (1983) We have emphasized, however, that the defendant must show more than a mere technical violation of a state law to obtain such relief. *Id. See also United States v. Timmreck,* 441 U.S. 780, 783-85 (1979); *Wacht v. Cardwell,* 604 F.2d 1245, 1247 (9th Cir. 1979). Indeed, to support a claim for relief under 28 U.S.C. § 2254, "a petitioner must show that he was prejudiced or that his rights were affected by the omission by the state trial judge." *Wayne,* 690 F.2d at 687.

Neither the Supreme Court nor this court has had an occasion to lay out the precise contours of the prejudice standard

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[1]Section 1170(c) provides in relevant part: "The court shall inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000."

[2]It should be noted that the Ninth Circuit has held that lack of awareness of a mandatory parole term when pleading guilty renders the plea involuntary and thus constitutes a violation of the defendant's constitutional right of due process. *See Carter v. McCarthy,* 806 F.2d 1373 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 198 (1987). Indeed, the district court relied on *Carter* in granting Blair's petition for habeas corpus. *Carter,* however, was decided more than four years after Blair entered his guilty plea. Since the district court's grant of collateral relief can be affirmed on the alternative grounds set forth below, we need not decide whether *Carter* should be applied retroactively. *See United States v. Burnette,* 698 F.2d 1038, 1049 (9th Cir.), *cert. denied,* 461 U.S. 936 (1983)(appellate court may affirm the district court on any basis fairly presented by record that, as a matter of law, sustains the judgment).

in this context. While *United States v. Timmreck*, 441 U.S. at 784 (1979), which involved a request for collateral relief based upon a technical violation of Fed R. Crim. P. 11, hinted that proof that the defendant was actually unaware of a mandatory parole term and that had he been properly advised by the court he would not have pleaded guilty may constitute a sufficient basis for providing collateral relief, the Court expressly left open the question of what set of circumstances, if any, would support collateral relief. *See also Wacht v. Cardwell*, 604 F.2d at 1247 (petitioner failed to allege any facts showing he was prejudiced by state trial court's failure to inform him of his ineligibility for parole upon acceptance of plea where petitioner did not allege he was unaware of ineligibility or that he would not have pleaded guilty had he known of ineligibility).

However, in *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court had an opportunity to set forth a prejudice standard in a strikingly similar context to the case at bar. In *Hill*, the Court was faced with a collateral challenge under § 2254 to the validity of a guilty plea on the ground that the defendant had received ineffective assistance of counsel in violation of the Sixth Amendment. The Court held that the two-part test adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate ineffective assistance of counsel claims applies to challenges to guilty pleas based on ineffective assistance of counsel as well. *Id.* at 57. Thus, the Court held that in order to set aside a guilty plea, a habeas petitioner must show that his legal representation fell below an objective standard of reasonableness and that he was prejudiced by such assistance. Specifically, the Court stated that in order to satisfy the prejudice requirement in the plea context, a "defendant must show that there is a reasonable probability that, but for counsel's error(s), he would not have pleaded guilty. . . ." *Id.* at 59.

[1] We believe that the prejudice standard articulated in *Hill* is equally appropriate for determining whether collateral relief is justified in the face of a state trial court violation of

state law upon the acceptance of a guilty plea. Accordingly, we hold that once a habeas petitioner proves that the state trial court violated a state law by failing to inform him of a particular consequence of his plea, he should be granted collateral relief if he shows that there is a reasonable probability that, but for the state court's error, he would not have pleaded guilty. While we are cognizant of the need to avoid undue expansion of the scope of habeas relief, we are certain that, as implicitly recognized in *Strickland* and *Hill*, this prejudice standard sufficiently reserves habeas corpus relief to only those instances in which there has been a "fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the demands of fair procedure." *Timmreck*, 441 U.S. at 783 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

[2] Applying this prejudice standard to the case at bar, it is clear that habeas corpus relief should be granted. McCarthy does not dispute the district court's finding that Blair was unaware of a mandatory parole term and that, had he known of the term, he would not have pleaded guilty. This finding more than satisfies the appropriate prejudice standard. Thus, we affirm the district court's order releasing Blair from any further parole obligations pursuant to his 1983 plea.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROULETTE BLAIR, *Petitioner-Appellee,* v. DANIEL J. MCCARTHY, et al., *Respondents-Appellants.*	No. 87-6690 D.C. No. CV-87-2508-WJR ORDER

Filed February 27, 1990

Before: Jerome Farris, Cecil F. Poole and Warren J. Ferguson, Circuit Judges.

ORDER

The opinion, 881 F.2d 602 (9th Cir. 1989), is amended as follows:

The first full paragraph of the second column at 881 F.2d 603 (beginning with "This court has expressly recognized . . .") is amended to read:

> It is well-established that an allegation of a mere technical violation of state law, by itself, does not support a claim for federal habeas relief. *See Engle v. Isaac,* 456 U.S. 107, 121 n.21 (1981); *Wayne v. Raines,* 690 F.2d 685, 687 (9th Cir. 1982), *cert. denied,* 464 U.S. 914 (1983). This circuit has held, however, that when a defendant has not been informed of a penal consequence of his guilty plea in violation of state law and the defendant shows that "he was prejudiced or his rights were affected by the

omission by the state trial judge," he may obtain federal collateral relief. *Wayne*, 690 F.2d at 687.

Judge Poole does not concur in the amendment.

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APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

March 26,1990

ROULETTE BLAIR, Petitioner-Appellee, v. DANIEL J. McCARTHY, et al., Respondents-Appellants.	No. 87-6690 D.C. No. CV87-2508-WJR ORDER

Before: FARRIS, POOLE, and FERGUSON, Circuit Judges

Judges Farris and Ferguson voted to deny and Judge Poole voted to grant the petition for rehearing. Judge Farris voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommended. Judge Poole believed that rehearing en banc might be warranted.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.